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206571

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. [illegible]

UNITED STATES OF AMERICA, *Petitioner*

v.

THE TOWN OF CLARKSVILLE, VIRGINIA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Acting Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment entered on August 5, 1952, by the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (R. 97-106) is reported at 198 F. 2d 238. The opinion of the district court (R. 12-20) is reported at 104 F. Supp. 369.

JURISDICTION

The judgment of the Court of Appeals was entered August 5, 1952 (R. 106). The time for filing a petition for a writ of certiorari was extended to and including December 3, 1952, by order of the Chief Justice dated October 29, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in a condemnation proceeding in which the sewer system of a municipality is taken, the United States, in making just compensation by paying the cost of a substitute system, must pay for a sewage treatment plant required by order of a State Board to be installed, when no such plant existed at the time of taking and the Government project does not increase the need for it.

2. Whether, in a condemnation proceeding in which a sewer system of a municipality is taken, the United States, in making just compensation by paying the cost of a substitute system, must pay the capitalized cost for a reasonable length of time of operating and maintaining lift stations which the United States has agreed to construct as a part of the substitute system.

STATEMENT

On January 7, 1952, the United States instituted proceedings (R. 4) to condemn certain

sewer and water lines of respondent, the Town of Clarksville, Virginia, because the lines would be covered by the reservoir created by the construction of the John H. Kerr Dam and Reservoir Project.

The existing gravity sewer system was constructed about twenty-five years ago and discharged raw sewage at four separate points in the Dan and Roanoke Rivers (R. 34-35, 73). The pollution of the waters of the State had been a problem, and in 1946 the State Water Control Board was organized[1] to provide for the abatement of pollution. In 1947, the Board issued to respondent a permit to continue to discharge its untreated sewage into the Roanoke River, the permit being valid until revoked by the Board (R. 82). Under the Board's policy the license was indefinite in term, customarily not to be revoked or modified until a substantial change should be made in the use or layout of the system, or until such time in the future as the Board should fulfill its program to prohibit throughout the State use of its waters for sewerage purposes (R. 14, 16, 101). In 1949, the Board adopted a regulation providing that every owner discharging untreated sewage into the waters of the State shall proceed immediately to develop a program for substantial reduction in pollution, which pro-

[1] Acts of General Assembly of Virginia, 1946, c. 399, p. 960; Va. Code of 1950, title 62, c. 2, sec. 10 *et seq.*

gram shall include the preparation of plans for such treatment plant and facilities as may be found necessary to accomplish these results. It also provided for the filing of progress reports for every three month period (R. 26-27). Respondent made a number of reports to the Board, indicating that it had been prevented from making any definite plans as to a treatment plant because of the uncertainties resulting from the construction of the Kerr Dam project (R. 102-103). On two occasions, the Board requested repsentatives of respondent to discuss with it the problem of sewage treatment (R. 103).

Such was the situation when the condemnation proceeding was instituted. The Government and respondent agreed that just compensation would be made by the providing of substitute facilities by the Government. Respondent submitted to the State Water Control Board plans for a substitute system which included an outfall and five lift stations. On January 28, 1952, the Board ruled (R. 28) that:

(1) Sewage from the Town of Clarksville should be treated regardless of whether the reservoir is filled or not, and regardless of whether the sewer is changed or not.

(2) The necessity of providing sewage treatment for the Town of Clarksville is not lessened by the filling of the reservoir or the relocation of the Town's sewer system.

(3) The Board will authorize construction and use of the proposed new sewer system if assurance satisfactory to the Board is given that sewage treatment will be provided within one (1) year after the new sewer system is put into use.[2]

On February 21, 1952, the parties entered into a stipulation (R. 4-9) by which the Government agreed to construct the substitute sewage system, including five lift stations which were necessary to move the sewage over the hills. The stipulation further provided that it be left for judicial determination as to whether the following are compensable items of just compensation:

(a) Cost of constructing a sewage treatment plant;

(b) Cost of operation and maintenance of five lift stations; and

(c) Engineers' fees in connection with the preparation of specifications and drawings, and construction of the facilities.

After a hearing, at which the Government conceded that it should pay engineering costs, the district court held (R. 12-20) that the Government was not liable for the cost of a sewage treatment

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[2] The Board later ruled that the new system should not be used until a sewage treatment plant was provided (R. 31-32).

plant and the cost of maintaining and operating the lift stations. The court reasoned that the treatment plant was not a consequence of the project, since it found that the effect of flooding by the Government was not to increase pollution of the water. It further reasoned that the estimated value of the future cost of operating and maintaining the lift stations for the estimated life of ninety-nine years was too speculative. On May 8, 1952, an order to that effect was entered (R. 20-21), which further provided that the action be held open pending the performance of stated conditions. Notice of appeal from this order was filed May 12, 1952.[3]

The Court of Appeals reversed the decision of the district court. It reasoned that respondent was under no duty to build the sewage treatment plant before the condemnation because the State Water Control Board had taken no positive action requiring that it be built, and without the alteration of the sewage system by the Government

[3] In the Government's brief and at the oral argument in the Court of Appeals, the question of finality of the order was raised. In order to cure the apparent defect, respondent moved the district court for an order in conformance with Rule 54(b), Federal Rules of Civil Procedure. On July 9, 1952, the court entered such an order (R. 95-96). No appeal from this order was filed. The Court of Appeals held that the order of May 8, 1952, was not appealable under Rule 54(b), since the case was held open for future determinations, but that since the issuing of the order of July 9, 1952, "we think there is now jurisdiction to consider the appeal" (R. 98).

there was a strong inference that the Town could have operated under its present license for many years, if not indefinitely, without being required to build a treatment plant. It held that the fact that pollution was no greater after the Government's project than before was not controlling, and concluded, "We fail to see how it can logically be argued that the Government's action did not fasten this obligation upon the Town." It further held that the lift stations are a new element which the Government has forced upon the Town, and it must bear all the added burdens which are thereby created. But it also held that the claim of respondent for an approximate lump sum payment, based on the present value of the annual maintenance and operational expense of the lift stations for their estimated life of ninety-nine years, is manifestly in excess of the requirements of just compensation; that the capitalized period should be much shorter, "within practical bounds"; and that respondent is entitled only to the reasonable cost of operating the five lift stations "for a reasonable period of time."

REASONS FOR GRANTING THE WRIT

1. Many cases have arisen, particularly in recent years, where local public service facilities such as streets, highways, water lines, and sewage lines are taken in the execution of a federal project. The just compensation payable for the

taking of such facilities cannot be measured by the market value of the properties condemned because they normally have no market value in any real sense. Recognizing this fact, the rule has become established that when the taking also involves the condemnation of all the property served by the street, sewer line, etc., only nominal damages are payable to the municipality, the value of the facility being represented by the amount it enhances the property served. *E.g., Mayor and City Council of Baltimore* v. *United States,* 147 F. 2d 786 (C.A. 4); *State of California* v. *United States,* 169 F. 2d 914, 924-925 (C.A. 9); *City and County of Honolulu* v. *United States,* 188 F. 2d 459 (C.A. 9), certiorari denied, 342 U.S. 849; *Woodville* v. *United States,* 152 F. 2d 735 (C.A. 10). If, however, the area served by the facility is not taken, the United States is obligated to provide whatever substitute facilities may be necessary. *Mayor and City Council of Baltimore* v. *United States,* 147 F. 2d 786 (C.A. 4); *Jefferson County, etc.* v. *Tennessee Valley Authority,* 146 F. 2d 564, 565 (C.A. 6), certiorari denied, 324 U.S. 871; *United States* v. *City of New York,* 168 F. 2d 387, 389, 390 (C.A. 2). As the court said in the *Baltimore* case, *supra,* "The owner must be put in as good position pecuniarily as he would have occupied if his property had not been taken." And in *Jefferson County, etc.* v. *Tennessee Valley Authority,* 146 F. 2d 564, 565 (C.A. 6), certiorari

denied, 324 U.S. 871, the court defined the obligation to be such sum "as will pay the cost of road facilities equal in utility to those destroyed."

In the instant case, the federal project will flood a portion of the Town of Clarksville, making necessary the construction of substitute water and sewage facilities. It was stipulated that such new facilities would be constructed by the United States according to agreed plans. No sewage treatment plant existed as a part of the Town's system prior to the taking. The trial court found that the Government's dam would not aggravate, but rather would diminish, the dangers incident to the pollution of the Roanoke River by the untreated sewage from Clarksville (R. 16). The Court of Appeals did not overturn this finding, and it recognized that there was conflicting evidence as to the fact that there was just as much pollution under the old system as there will be under the new. Thus, in the words of the *Jefferson County* case, the United States has without contest provided facilities equal in utility to those destroyed.

The decision of the Court of Appeals, however, obligates the United States to provide a better system than that existing at the time of taking, although it was the requirement of the State Board for improved facilities which necessitated the new treatment plant. The Court of Appeals reached that result because, in its words, "there

is a strong inference that, without such forced alteration by the Government, the Town could have operated under its present license for many years, if not indefinitely, without being required to build a treatment plant." The Government's action, said the court, "was at least operative as both notice and spur to the Board to act" (R. 103). The United States was held liable for the treatment plant because, whatever the reason, the Town "is now under an obligation that it did not have before." The liability of the United States is thus increased merely because action of the State Water Control Board coincided with the construction of the federal project. Such a result requiring the United States to subsidize a treatment plant which is newly required and which the Government did not take, would, we submit, be unjust to the public which must pay the bill. *United States* v. *Commodities Corp.*, 339 U.S. 121, 123; *Bauman* v. *Ross*, 167 U.S. 548, 574.

The position taken by the court below is in many respects similar to the "retention value" concept rejected in the *Commodities* case. The Court there disallowed the enhanced price that the owner claimed it could have secured for its pepper had it been permitted to hold it until after wartime price restrictions had been removed. This case presents a different factual application of fundamentally the same principle, *i.e.*, a "retention advantage" arising solely from the assumed fact that, so long as the Town retained

the present system, it would not have to provide a treatment plant.[4] The frustration of respondent's hope of continued discharge of its sewage into the river would also seem to differ in no way from the frustration of a business prospect, which is clearly not an element of just compensation. *United States ex rel. T.V.A.* v. *Powelson*, 319 U.S. 266, 282, and cases there cited. The district court expressed the same thought when it pointed out that the previous indulgence of the State Board towards the Town was not a right or property of the Town for whose destruction or impairment compensation could be claimed. Cf. *United States* v. *Petty Motor Co.*, 327 U.S. 372, 380.

The decision primarily relied upon by the court below, *United States* v. *Wheeler Township*, 66 F. 2d 977 (C.A. 8) does not support its conclusion. That was a "peculiar" case (66 F. 2d, at p. 984) involving the improvement of the existing roads to meet more burdensome conditions imposed by the Government's taking, rather than, as here, the addition of an entirely new feature which had

[4] As in the *Commodities* case, it is entirely speculative whether the Town would have been permitted to continue its operation for many years without change. Thus, an intention to compel the building of a treatment plant is shown by the regulation passed by the Board in 1949 (R. 26-27) (*supra*, pp. 3-4), by the ruling of the Board that sewage from the Town of Clarksville should be treated regardless of whether the reservoir is filled or not, and regardless of whether the sewer is changed or not (R. 28) (*supra*, p. 4), and by the testimony of a member of the Board that it is the purpose and obligation of the Board eventually to require all towns to build treatment plants in order to eliminate pollution.

no counterpart in the old system. Moreover, it was not there determined that the Government should bear the entire cost of the improvement necessary to bring the existing facilities up to standard, but the Government was held liable only for the difference between the cost of the improvement under prior conditions and under the new conditions imposed by the taking *i.e.*, the increased cost resulting from the taking (66 F. 2d, at pp. 984, 985). In the instant case, the cost of the treatment plant, which respondent has to provide under the State Board's order, has not been increased by the taking. Indeed, because of the substitute facilities the Government has agreed to construct, the cost has been decreased. Rather than the *Wheeler Township* case, the authorities applicable here are decisions that the compensation payable by the United States cannot be increased because, as a result of its taking, a regulation imposing additional requirements—for example, safety regulations—is brought into play (*Baltimore Steam Packet Co.* v. *United States*, 81 F. Supp. 707 (C. Cls.)), or because a better facility may be desirable in connection with construction of a substitute. *Iowa-Wisconsin Bridge Co.* v. *United States*, 84 F. Supp. 852, 868 (C. Cls.), certiorari denied, 339 U.S. 982. See also, *United States* v. *0.886 of an Acre of Land, Etc.*, 65 F. Supp. 827, 829 (E.D. N.Y.).

2. The district court rejected the claim for the present value of the annual maintenance and

operational expense of the lift stations for their estimated life on the alternative grounds that (a) such expenses are not factors of just compensation and (b) the claim is conjectural, speculative and prophetic (R. 17-19). In reversing, the Court of Appeals reasoned that this was not a mere increase in operation expense but a cost item that is keyed to the very existence of the new system (R. 105). It held, however, that the lump sum based on capitalization for the estimated life of the stations "is manifestly in excess of the requirements of just compensation" (R. 105) and that an award should be made "for a reasonable period of time" (R. 105-106).

In *United States* v. *25.4 Acres of Land*, 71 F. Supp. 255 (E.D. N.Y.), a claim for the capitalized value of the increased operating costs of a trolley line was disallowed because such damage was consequential and did not constitute an element of value of the property taken and because there was no convincing evidence of an annual recurring loss, although it was unquestioned that the longer route required the use of two additional cars. 71 F. Supp. at pp. 259-262. This decision was affirmed upon the opinion of the district court as to this claim. *United States* v. *City of New York*, 168 F. 2d 387, 391 (C.A. 2). The United States has furnished the Town of Clarksville the necessary sewage system including the lift stations. Any increase in operating and maintenance costs

is, we submit, consequential damage of the same nature as business losses. *United States* v. *Petty Motor Co.*, 327 U.S. 372, 378; *Mitchell* v. *United States*, 267 U.S. 341, 345. The court below apparently agreed that an award could not be based upon a comparison of general operating costs between the old system and the new.[5] Nevertheless, it imposed upon the United States liability for the operation and maintenance expense of the lift stations by segregating those stations from the entire sewer system. The stations are, however, an integral part of the whole system, cannot be operated separately, and perform no function except in connection with the system. Their theoretical segregation from the system for the purpose of making this award is no more warranted than the attempted segregation by the City of New York of the two additional trolley cars from the rest of the system (*supra*, p. 13).

The Court of Appeals held that the amount claimed by the Town was "manifestly in excess of the requirements of just compensation" (R. 105). But it asserted that it is not existence of the loss but merely its amount which is conjectural and directed an award for operating cost for "a reasonable period of time" (R. 105). No basis or criterion for determining such reasonable period

[5] While there was no operating cost attached to the old gravity system, there were undoubtedly some maintenance costs. And since the system was twenty-five years old and contained several breaks, the possibility of increased maintenance cost is not to be ignored.

is suggested. The only standard of reasonableness which suggests itself—the reasonable life of the stations—has been rejected. Thus, the trial court can only select arbitrarily a number of years. No principle appears which would indicate, for example, that five years rather than twenty-five years constituted a reasonable period of time. Any award must, therefore, be not only speculative but purely arbitrary.

3. The questions presented are important and have a wider reach than the instant case. In recent years, the problem created by the discharge into streams of municipal and industrial wastes has received increasing attention. While the problem is primarily a local one, the federal interest therein was recognized in the Water Pollution Control Act of June 30, 1948, 62 Stat. 1155,[6] which provided for the cooperation of the United States Public Health Service in the development of pollution control programs. One feature of this program was the promotion of local water pollution control laws and a suggested act has been developed which is endorsed by the Council of State Governments. See H. Rep. No. 1990, 82d Cong. 2d sess.; Annual Report of the Federal Security Agency 1951, pp. 137-138. Statutes following generally the same pattern as the Virginia law have been adopted in more than 30 states, most of them in the

[6] This Act was extended by Public Law 579, 82d Cong., 2d sess.

period from 1947 to 1951, and steps to the same end have been taken in many of the remaining states. It is not unlikely that, as in this case, costly improvements like treatment plants will be deferred until major structural changes or replacements, such as ensue upon a taking, occur. The execution of the many federal river improvement projects for navigation, flood control, or other purposes will therefore probably present problems like the ones in the instant case as progress is made in the enforcement of these recently enacted local laws. The extent to which the Federal Government is required to compensate local municipalities or industries for treatment plants or other installations required by State Boards may well have an important bearing on the cost of such projects in the future.

And the rule of the decision below is by no means limited to sewerage facilities. Almost any federal project of substantial size requires the readjustment of some local public service facilities, especially streets, highways, and bridges. Problems both as to betterments which may be required by local law when new installations are made and as to the extent to which the United States is liable for increased maintenance and operating costs have occurred in substantial number and will frequently recur in the execution of such projects. A definition of the scope of the Government's liability is particularly desirable as a guide to ad-

ministrative authorities in reaching agreements for the execution of physical solutions which render litigation unnecessary.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT L. STERN,
Acting Solicitor General.

DECEMBER 1952.

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